

No. 82-1095

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

R. PULLEY, Warden of the
California State Prison at
San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

RESPONDENT'S
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The respondent, Robert Alton Harris, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 692 F.2d 1189.

The Ninth Circuit remanded respondent Harris' case to the federal district court in order that four separate claims be resolved in further proceedings. The remand requires consideration of respondent's claims of prejudicial pre-trial publicity (Appendix A, 37-38), and discriminatory infliction

of the death penalty based on race of the victim and sex of the offender (id. at 29-32), and permits the California Supreme Court "to determine if the death penalty in this case is proportionate to other sentences imposed for similar crimes" (id. at 22).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision Below Does Not Raise The Question Presented by Petitioner.

Petitioner states the question presented herein as

"Whether, in addition to the procedures whereby a trial court and jury impose a death sentence, the Federal Constitution requires any specific form of 'proportionality review' by a court of statewide jurisdiction prior to the execution of a state death judgment." (Pet., p.1.)

Petitioner bases this phrasing of the question on its reading of the opinion of the Court of Appeals herein as holding "that the federal constitution precludes the execution of a state death judgment until the highest court of that state has conducted a separate and discrete 'proportionality review'. . . ." (Pet., p.18).

However, a careful analysis of the Court of Appeals opinion reveals that petitioner has misapprehended the thrust of that opinion and, based on that misapprehension, has misstated the question presented herein. As we will show, the crux of the opinion below is that it requires the California Supreme Court to undertake the proportionality review which the state court ruled was available in People v. Frierson (1979) 25 Cal.3d 142, 180, 184, and that, the proportionality review established by the latter court in Frierson was grounded in state law.

The bottom line of the Ninth Circuit opinion herein is its conclusion:

"Because the California Supreme Court did not undertake the proportionality review it announced in People v. Frierson, 25 Cal.3d at 183, and in People v. Jackson, 28 Cal.3d at 317, we vacate the district court's denial of the petition and instruct the district court to grant the petition relieving petitioner from his sentence of death unless the California Supreme Court undertakes, within a reasonable time not to exceed 120 days from the date that this order is filed, the proportionality review." (App. A, p.71; emphasis added.)

The question then becomes the doctrinal basis of the proportionality review announced in Frierson. A review of that opinion shows that such review is grounded, at least in part, in state law, i.e., article, I, sec. 17 of the California Constitution. Thus, the Frierson court stated

"Moreover, we are now guided by well established proportionality principles of general application. In reviewing assertions that a particular sentence amounts to cruel or unusual punishment under the state Constitution (art. I, §17), we must determine whether the penalty 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (In re Lynch (1972) 8 Cal.3d 410, 424 [105 Cal. Rptr. 217, 503 P.2d 921], italics added, fn. omitted; see also People v. Wingo (1975) 14 Cal.3d 169, 182-183 [121 Cal.Rptr. 97, 534 P.2d 1001] [proportionality review on a case-by-case basis for offenses involving a wide range of conduct]; People v. Anderson, *supra*, 6 Cal.3d 628, 641-645 and cases cited [proportionality review in earlier death penalty cases].)

"In determining disproportionality under Lynch, we examine the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' (8 Cal.3d at p.425.) In addition, we ascertain whether more serious crimes are punished in this state less severely than the offense in question. If so, 'the challenged penalty is to that extent suspect.' (Id. at p.426.) Finally, under Lynch we compare the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having identical or similar constitutional provisions regarding cruel and/or unusual punishment. (Id. at p.427.) Although not all of these tests of disproportionality may be appropriate in reviewing a sentence of

death in a particular case, our Lynch principles demonstrate our awareness of a constitutionally derived responsibility to assess the proportionality of a particular punishment in criminal cases generally to assure that justice is dispensed in a reasonably evenhanded manner. Such a responsibility and commitment borne in criminal cases which invoke a more modest sanction can be no less when the penalty is the most extreme. Furthermore, our performance of this function in no way interferes with the statutory sentencing powers of the trier of fact in death penalty cases." (25 Cal.3d at 183.)

Thus, while there is language in the Ninth Circuit opinion discussing proportionality review as a federal constitutional requirement, that Court did not base its decision solely on any federal constitutional ground. Rather, its decision is equally and independently grounded in California state law, specifically article 1, section 17 of the California Constitution and the Frierson decision regarding the applicability of that state constitutional section to review of death judgments.^{1/} Indeed, petitioner admits as much:

1. Thus, the Ninth Circuit decision below can be viewed as simply correcting a federal due process violation by the state. Where the state creates a substantial right, such as proportionality review, the arbitrary denial of that right by the state is a federal due process violation even if the right itself is not federally guaranteed.

In Hicks v. Oklahoma (1980) 447 U.S. 343, 346, the petitioner's sentence had been affirmed by a state appellate court even though the statute, under which his sentencing jury was instructed to impose a mandatory minimum sentence, had been held unconstitutional by the state courts. This Court found a denial of due process:

"It is argued all that is involved in this case is the denial of a procedural right of exclusively state concern. Where however, a state has provided for the imposition of punishment in the discretion of a trial jury, it is not correct to say that the defendant's interest of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, (Citation) and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state. (Citations.)"

"In its opinion, the Ninth Circuit ruled that California's death penalty statute is constitutional, but that a 'proportionality review' is required both under state law, and under the federal constitution as amplified by this court's decisions in *Gregg v. Georgia* (1975) 428 U.S. 153; *Proffitt v. Florida* (1975) 428 U.S. 242; and *Jurek v. Texas* (1975) 428 U.S. 262." (Pet., p.12.)

2. Review of the Question Presented Even if Properly Before the Court, is Premature.

Petitioner urges that case-comparison (or proportionality review) is not required as a federal constitutional mandate. Respondent, however, urges that it would be premature and inappropriate for this Court to consider the issue of proportionality review at this time.

Before this Court can consider the issue of whether California's form of case-comparison review comports with federal constitutional standards, it must first have the benefit of the California Supreme Court's interpretation of the California statute. The issue is currently before that Court in *In re Jackson*, Crim No. 22165. (See concurring opinion of Justice Kaus in *People v. Easley* (1982) 33 Cal.3d 65, 93 (rehearing granted 2/23/83), noting that the issue of proportionality review is "unsettled" in that Court and is pending in *Jackson*.)

In *Zant v. Stephens* (1982) ____ U.S. ____, 72 L.Ed.2d 222, this Court declined to address constitutional issues concerning the appropriateness of Georgia's review of a death sentence because the issues were premature. The Court certified the questions back to the Georgia Supreme Court to resolve the "considerable uncertainty about the state-law premises" of its [previous] ruling." (*Id.* at 226.)

This is precisely the effect of the Ninth Circuit's

order below which permits state clarification of the proportionality question. Nothing precludes

" . . . a federal court from awaiting a state court construction of an ambiguous state statute, if there is a reasonable possibility that determination of a federal constitutional question would thereby be avoided." (Mengelkoch v. Industrial Welfare Commission (9th Cir. 1971) 442 F.2d 1119, 1125.)

Indeed, this is consistent with the time-honored rule of Ashwander v. Tennessee Valley Authority (1935) 297 U.S. 288, 346-348 (Brandeis, J., concurring), that this Court does not decide constitutional questions in advance of necessity.

Further, as noted above, the California Supreme Court has recognized its general authority to conduct proportionality review in death cases under the state constitution. Thus, another reason to await clarification by the California Supreme Court is the possibility that the proportionality review question will be decided on state grounds (e.g., People v. Krivda (1971) 5 Cal.3d 357, vacated 380 U.S. 194 (1965) opinion on remand, 9 Cal.3d 454 (1973)).

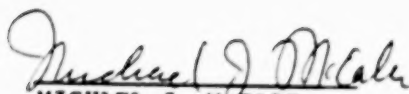
CONCLUSION

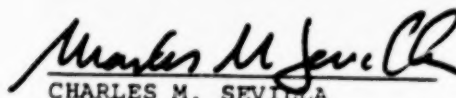
"It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case" (Burton v. United States (1905) 196 U.S. 283, 295). Since petitioner's case is being remanded for resolution of three issues other than the one question on which petitioner seeks review, there is no immediate necessity to decide the proportionality question. Any decision by this Court would be advisory in nature since petitioner's death sentence could be overturned on remand on any one of the three claims yet to be resolved in the district court. Further, in light of the ambiguity of the state court interpretation of its own statute on the proportionality question, it is entirely appropriate to await the California court's clarification of the authority for and scope of the proportionality review it will afford petition.

Therefore, the petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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State Public Defender


MICHAEL J. McCABE
Attorney at Law


CHARLES M. SEVILLA
Chief Deputy State
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Attorneys for Respondent
ROBERT ALTON HARRIS

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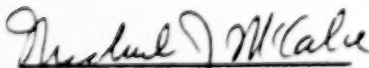
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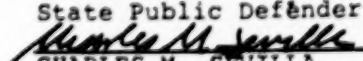
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Pursuant to 18 U.S.C. section 3006A(d)(6) and Rule 46 of this Court, the respondent, Robert Alton Harris, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of the United States, without prepayment of fees or costs and to proceed in forma pauperis.

Respondent has been indigent at all times during the proceedings against him. In both the state courts as well as in the federal courts below he has had counsel appointed to represent him.

Respectfully submitted,


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Attorney at Law

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State Public Defender

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Public Defender

2/24/83

No. 82-1095

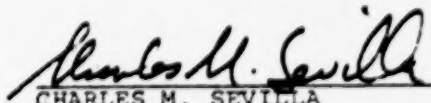
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the attached Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari by depositing the above in the United States mail, postage prepaid and properly addressed to:

JOHN VAN DE KAMP
Attorney General's Office
Attn: Michael Wellington
110 West A St., Suite 700
San Diego, CA 92101

I further certify that all parties required to be served have been served. Dated this 24th day of February, 1983 at San Diego, California.


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